

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERRY J. SMITH,)	CASE NO.	C08-0303-RSL-MAT
)		(CR94-006-RSL)
Petitioner,)		
)		
v.)	REPORT AND RECOMMENDATION	
)		
UNITED STATES OF AMERICA,)		
)		
Respondent.)		
_____)		

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner filed a motion under 28 U.S.C. § 2255 seeking to vacate, set aside, or correct his 1994 federal court sentence. (Dkt. 1.) Respondent opposed petitioner's motion. (Dkt. 6.) Petitioner did not submit a reply. Following careful review of the record, the Court concludes that petitioner's § 2255 motion should be denied.

Petitioner entered a guilty plea to one count of Bank Robbery on January 7, 1994. The Court sentenced petitioner, on March 11, 1994, to one hundred and fifty-one months in prison and a three year term of supervised release, and entered the judgment as of that same date. Petitioner did not file a direct appeal or pursue any other post-conviction relief.

01 Petitioner began his term of supervised release on March 13, 2007. His supervision was
02 revoked on July 25, 2007 and December 18, 2007. Upon the latter revocation, he was sentenced
03 to ten months imprisonment, with his supervised release to be terminated upon his release from
04 prison.

05 Although the precise contours of petitioner's claims are unclear, he separates his
06 arguments into four grounds for relief in his motion to vacate. First, he alleges ineffective
07 assistance of counsel through his attorney's failure to raise an affirmative defense of diminished
08 capacity based on a history of mental disorders. He explains that he did not pursue this issue on
09 appeal because his attorney did not file a direct appeal as instructed. Second, petitioner alleges
10 ineffective assistance of counsel through his attorney's failure to pursue the argument that he
11 lacked the requisite criminal intent due to his post-traumatic stress disorder. Again, he explains
12 that he did not pursue this issue on appeal because his attorney did not file a direct appeal as
13 instructed. Third, and presumably related to his second ground for relief, petitioner argues
14 generally that he was unable to appreciate the nature and quality or wrongfulness of his acts.
15 Fourth, petitioner argues that he was not competent to stand trial, stating that he currently has
16 post-traumatic stress disorder and was delusional while the crime was committed.

17 In response, respondent contends that petitioner failed to file his motion to vacate in a
18 timely manner and that his claims are now time-barred. The Court, having reviewed petitioner's
19 § 2255 motion, respondent's response, and the balance of the record, hereby concludes that
20 petitioner's claims are time-barred and that his § 2255 motion should be denied.

21 Section 105 of the Antiterrorism and Effective Death Penalty Act (AEDPA) established
22 a one-year period of limitation governing motions filed under § 2255. AEDPA, Pub. L. No.

104-132, § 105, 110 Stat. 1214, 1220 (codified at 28 U.S.C. § 2255). The statute of limitations begins to run from:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

Here, petitioner avers the existence of new evidence in support of his claims. Yet, he fails to explain this contention. Instead, as argued by respondent, there is no indication that the issues raised – including both his mental capacity and his attorney’s failure to file a direct appeal – were not known to him at the time of or soon after his conviction. Nor is there any explanation as to how, almost fourteen years after plaintiff was convicted, these issues could reasonably be deemed newly discovered. Because petitioner fails to identify any newly discovered facts, the Court concludes that petitioner’s statute of limitations began to run on the date on which the judgment of conviction became final.

Where no direct appeal has been filed, the conviction becomes final at the expiration of the time in which such an appeal could have been filed – ten days after the entry of judgment. *United States v. Schwartz*, 274 F.3d 1220, 1223 & n.1 (9th Cir. 2001) (citing the ten-day filing deadline of Rule 4 of the Federal Rules of Appellate Procedure). In this case, because petitioner did not

01 file a direct appeal, his conviction became final ten days after the entry of judgment on March 11,
02 1994. As such, petitioner filed his motion to vacate, on February 21, 2008, almost fourteen years
03 after his statute of limitations expired.

04 The only recognized exception to the statute of limitations is equitable tolling. See
05 *Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled*
06 *in part on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530, 540 (9th
07 Cir. 1998) (en banc).¹ However, “[e]quitable tolling will not be available in most cases, as
08 extensions of time will only be granted if ‘extraordinary circumstances’ beyond a prisoner’s
09 control make it impossible to file a petition on time.” *Id.* (quoting *Alvarez-Machain v. United*
10 *States*, 107 F.3d 696, 701 (9th Cir. 1997)). “When external forces, rather than a petitioner’s lack
11 of diligence, account for the failure to file a timely claim, equitable tolling of the statute of
12 limitations may be appropriate.” *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (applying
13 equitable tolling where delay on the part of prison officials was beyond petitioner’s control and
14 petitioner demonstrated due diligence in submitting habeas petition).

15 Again, petitioner avers without explanation as to the existence of new evidence and his
16 attorney’s failure to file an appeal. He fails to demonstrate extraordinary circumstances beyond
17 his control. Indeed, the almost fourteen year delay in the filing of this petition demonstrates
18 petitioner’s lack of diligence.

19 Because petitioner failed to show extraordinary circumstances that would justify his
20

21 ¹ *Calderon (Beeler)* addressed the time limitation for 28 U.S.C. § 2254 petitions.
22 However, because the time limitations in both statutes are virtually identical, the equitable tolling
rule should be interpreted to apply to § 2255 motions as well.

01 delinquency, his petition is time-barred and should be dismissed. A proposed Order of Dismissal
02 accompanies this Report and Recommendation.

03 DATED this 16th day of May, 2008.

04 

05 Mary Alice Theiler
06 United States Magistrate Judge